SUPREME COURT, U. S.

JUN 15 1961

JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 196[redacted]

NO. [redacted] 13

LOCAL 164, LOCAL 1287, AND LOCAL 1010, each affiliated with THE INTERNATIONAL BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, AFL-CIO; AND THE INTERNATIONAL BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, AFL-CIO; AND DAVID W. JOHNS, AGENT FOR LOCAL 164,

Petitioners,

v.

THE NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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IN THE

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OCTOBER TERM, 1960

LOCAL 164, LOCAL 1287, AND LOCAL 1010, each affiliated with THE INTERNATIONAL BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, AFL-CIO; AND THE INTERNATIONAL BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, AFL-CIO; AND DAVID W. JOHNS, AGENT FOR LOCAL 164,

Petitioners,

v.

THE NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia, entered in the above-entitled case on April 27, 1961. Such judgment affirmed an order of the National Labor Relations Board directing such petitioners to refrain from insisting upon inclusion in a proposed col-

lective agreement with a painting contractor of a clause requiring such contractor to post a performance bond as a means of insuring compliance with the terms of such agreement, and from engaging in a strike to that end, such conduct being found by the Board to be a violation of Section 8 (b) (3) of the National Labor Relations Act, as amended.

OPINION BELOW

The opinion of the Court of Appeals below is not yet reported and is attached hereto as Appendix A. See also R. 33.

JURISDICTION

The judgment of the Court of Appeals was entered on April 27, 1961, but the decree has not yet been entered.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254.

QUESTION PRESENTED

Whether petitioners were guilty of a failure to bargain in good faith in violation of Section 8 (b) (3) of the National Labor Relations Act by insisting, as a condition to agreement, that the collective bargaining contract contain a provision requiring the employer to post a performance bond to insure compliance with the terms of the agreement.

STATUTES INVOLVED

The pertinent provisions of the Labor-Management Relations Act, 1947 (61 Stat. 136, 29 U.S.C. Section 151, *et seq.*), are Section 8 (b) (3):

> "It shall be an unfair labor practice for a labor organization or its agents—
>
> "(3) to refuse to bargain collectively with an employer, provided it is the representative of his

employees subject to the provisions of section 9 (a);"

and Section 8 (d):

> "(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: . . ."

STATEMENT

A. *The Facts*

The facts in this case have been stipulated and are as follows:

Petitioners are a national labor organization, together with three of its local union affiliates, and an individual representative of one of these affiliates, petitioner Local 164, located in Jacksonville, Florida. During the course of annual negotiations with a painting contractor doing business as A. D. Cheatham Painting Company of Jacksonville, Florida, Local 164 requested that the contractor include in the collective agreement the following clause:

> "Section 12: As a protection against possible violations of any of the terms or conditions of this collective agreement, the undersigned agrees to post a bond of $5,000, which bond will be forfeited and paid to the union in the event that it is found by the Joint Trade Board hereunder that said contractor has committed any substantial breach of this agreement or has failed to comply with any of the terms or conditions of employment specified thereunder." (R. 2).

The union had requested this clause because during the preceding contract term it had trouble with this contractor over compliance (R. 6).[1] The clause is similar to one which the International Union and its affiliates had entered into with various other contractors throughout the country (R. 3).

Except in an instance not relevant here, agreement upon all other terms of the collective contract was arrived at between the parties, but upon the contractor's continued refusal to incorporate the clause, the Union called a strike to enforce its request in which strike it was assisted by the other petitioners (R. 3).

B. *Proceedings Below.*

Upon the filing of charges by contractor Cheatham, the Board issued a complaint against petitioners alleging that the insistence by petitioners to the inclusion of the performance bond clause in the contract to the point of strike action constituted refusal to bargain in good faith in violation of Section 8 (b) (3) of the National Labor Relations Act, as amended. The parties having stipulated the facts necessary for a determination, and having waived the right to a hearing before a Trial Examiner, the Board, on March 7, 1960, issued its Decision and Order in which it held that the petitioners had violated Section 8 (b) (3) of the Act by conditioning the contractual agreement with the inclusion of the performance bond provision. The only evidence of "bad faith" in bargaining by the Union was such insistence, and the Board found that the clause in question was a legal one which could voluntarily have been agreed upon by the parties but which, nevertheless, constituted a non-mandatory subject matter of collective bargaining

[1] The amount of the bond was at all times open for negotiation; the employer refused to agree to a bond in any amount (R. 3).

under the Act, particularly Section 8 (d) thereof (R. 15). The Board thereupon entered its order directing petitioner to cease from insisting upon such clause or to engage in strike action to obtain its inclusion in the collective agreement (R. 8).

Thereafter, petitioners filed a petition to review such order with the United States Court of Appeals for the District of Columbia Circuit, and that court, on April 27, 1961, in a divided opinion, sustained the Board. Judges Miller and Danaher wrote the *per curiam* majority opinion, and Judge Edgerton wrote a dissenting opinion in which, for the reasons set forth therein, he would have set aside the Board's order.

REASONS FOR GRANTING THE WRIT

This case involves an important question of the application and administration of the National Labor Relations Act, as amended, which has not been, but should be, settled by this Court. Further, the decision below is in direct conflict with such decisions of this Court as *N.L.R.B.* v. *Wooster Div. of Borg Warner Corp.*, 356 U. S. 342, *N.L.R.B.* v. *American National Insurance Company*, 343 U. S. 395, and *Local 24 Teamsters Union* v. *Oliver*, 358 U. S. 283.

By its action in directing petitioners to cease seeking to obtain the protection of a performance bond in the collective agreement of Local 164, the Board has intruded deeply into the bargaining process. In so doing it has contravened Congressional intention to permit freedom and latitude in collective bargaining, and has ignored applicable precedents of this court. Instead of leaving the parties free to negotiate clauses affecting their relationship with each other and having direct relevance to terms and conditions of employment or questions arising thereunder, the Board

has undertaken to determine an important, customary and otherwise legal term of the agreement for them.

Aside from the basic legal principle involved in such an unwarranted intrusion into the bargaining process, this case involves the practical outlawing of an important subject matter of collective bargaining traditionally included in collective agreements in the building and construction industry, the garment industry, and in other industries where experience with marginal or otherwise undependable individual contractors or employers has required unions to insert similar performance bond clauses for the protection of the members and employees embraced under the agreement.[2]

This practice and tradition of including such clauses in collective agreements goes far to demonstrate that the performance bond clause must be regarded as within the area of "wages, hours and other terms or conditions of employment * * * or any question arising thereunder * * * " defined as proper subject matters of collective bargaining under Section 8 (d) of the Act. This Court stated in *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U. S. 342, at 346, that the term 'bargain collectively' as used in the Act "has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States." (*cf.*, *N.L.R.B.* v. *American National Insurance Company* 343 U. S. 395, at 408).

As indicated above, Section 8 (d) of the Act declares that subject matters of collective bargaining include "wages, hours and other terms and conditions of employment, or

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[2] The prevalence of such clauses in American industry will be demonstrated if this petition is granted; the present record demonstrates such prevalence only in the painting industry (R. 3).

the negotiation of an agreement or any question arising thereunder. . . ." A bonding clause establishes as a condition of employment that employees will be able to perform work under the collective agreement with complete assurance that they will be paid in full for that work and that the other conditions and terms of the collective agreement will be lived up to. While the first concern of employees, and therefore of their bargaining representative, is that adequate wages, hours, seniority protections and fringe benefits be negotiated, it is of equally great concern that these wages and conditions, once agreed to, be realized. The responsibility of a bargaining representative does not end with its negotiation of satisfactory terms and conditions of work; it is also its responsibility to see to it that these terms are observed—that, if experience demonstrates the need, protections in this area be accorded.

As stated by Judge Edgerton below in his dissent:

> "The bonding proposal before us was petitioners' response to what they claimed were company breaches of a previous agreement. It was a 'direct frontal attack' upon a vital problem. Cf. Local 24, Teamsters Union v. Oliver, 358 U.S. 283, 294, 43 LRRM 2374. Provisions which tend to insure performance of the agreement 'materially affect' all its other provisions. Cf. National Labor Relations Board v. Lehigh Portland Cement Co., supra, 205 F. 2d at 823, 32 LRRM 2463."

The Board's position is even more difficult to understand when the purposes of the Act to prevent industrial strife are considered. The most practical and immediately effective (from the Union point of view) alternative to seeking the type of protection afforded by a performance bond would be for the Union to insist upon the right to strike during the term of the collective agreement in the event of substantial employer breach thereof. The Board has many

times held that the bargaining issue of a no-strike clause or the absence thereof in a collective agreement is a mandatory subject matter of bargaining under Section 8 (d) upon which the parties may insist to the point of impasse. See *Shell Oil Co.*, 77 NLRB 1036. Surely, the ultimate purpose of the Act is ignored and the Board acts anomalously when it gives a union the right to insist that the contract not contain a no-strike clause as a means of protecting against possible employer breaches of contract while at the same time it forbids a union from insisting upon a performance bond clause designed to achieve that same protection.[3]

In *N.L.R.B.* v. *American National Insurance Co.*, *supra*, this Court held that under Section 8 (d) of the Act Congress intended to give the bargaining parties great leeway in the choice of bargaining subjects each considered necessary to the protection of its interests, and held that the Board erred in finding an employer guilty of bargaining in bad faith merely because the employer insisted to the point of no agreement that a "management's rights" clause be included in the collective agreement for its protection. In the more recent case of *N.L.R.B.* v. *Borg-Warner*, *supra*, a majority of this Court agreed with the Board that there might be some few and exceptional issues which involve purely the internal operation of one of the parties and thus

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[3] That protection is even more important to unions and the employees they represent in view of the possibility that unions may not be able to bring suits for unpaid wage claims on their behalf, thus putting the individual members to the trouble and expense of litigation. See *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Company*, 348 U. S. 437. And it is significant that Congress recognizes the need for performance bond protection. In the Miller Act, 40 U.S.C., 270 A, 49 Stat. 793, Congress has provided that before any contract is awarded for public buildings for works worth over $2,000, the contractor must post a bond for "the protection of all persons supplying labor and material • • •"

were no business of the other party (in that case the employer's insistence on a clause under which the union would be required to take a strike vote of its members prior to being permitted to strike), but at the same time this Court affirmed its concept of good faith bargaining as set forth in the *American National Insurance* case and stated that Section 8 (d) must be given a broad application so as to include any issues which sought to regulate the relationship between the bargaining parties. The Court there, as in *American National Insurance*, warned the Board against intrusion into the bargaining process. That the Board has no function to suggest, approve, disapprove or interfere with the negotiation of any of the terms of the collective agreement other than those directly proscribed under the Act has been well established by this Court in other cases. See *Local 24, Teamsters Union* v. *Oliver*, 358 U. S. 283, 295, and *Local 1976, United Brotherhood of Carpenters* v. *N.L.R.B.*, 357 U. S. 93, 108. To quote briefly from the foregoing cases: "The goal of federal labor policy, as expressed in the Wagner and Taft-Hartley Acts, is the promotion of collective bargaining; to encourage the employer and the representative of the employees to establish, through collective negotiation, their own charter for the ordering of industrial strife." *Local 24, Teamsters Union* v. *Oliver*, *supra* at p. 295. What an agreement should contain "is an issue for determination across the bargaining table, not by the Board". *American National Ins. Co.*, *supra at* 409); the parties "are to work out their agreement themselves" *Local 24, Teamsters Union* v. *Oliver*, *supra*. The Board "has no general commission to police collective bargaining agreements and strike down contractual provisions in which there is no element of an unfair labor practice". *Local 1976, United Brotherhood of Carpenters* v. *N.L.R.B.*, *supra*, at p. 108.

CONCLUSION

The importance of the legal principle in this case, the practical result of the Board's decision in removing from the bargaining table a traditional and customary subject matter of collective bargaining, and the conflict of the decision below with other applicable decisions of this Court all warrant review by this Court. It is respectfully requested that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

LOCAL 164, PAINTERS v. NLRB
(Cheatham Painting Co.)

U.S. Court of Appeals District of Columbia Circuit

LOCAL 164, LOCAL 1287, and LOCAL 1010, BROTHERHOOD OF PAINTERS, AFL-CIO, et al. v. NATIONAL LABOR RELATIONS BOARD, No. 15643, April 27, 1961

Before WILBUR K. MILLER, Chief Judge, and EDGERTON and DANAHER, Circuit Judges.

Full Text of Opinion

PER CURIAM:—Local 164 of the Painters' union had had collective bargaining agreements with Cheatham Painting Company of Jacksonville, Florida, since 1945, until the latest of them expired in 1959. At bargaining meetings held prior to expiration, Local 164 submitted to the Company a new contract which covered wages, hours, and other terms and conditions of employment. Also included were two proposals which had not been submitted to other contractors in the area of the Local's jurisdiction, one of which reads:

> "Section 12: As a protection against possible violation of any of the terms or conditions of this collective agreement, the undersigned agrees to post a bond of $5,000, which bond will be forfeited and paid to the union in the event that it is found by the Joint Trade Board hereunder that said contractor has committed any substantial breach of this agreement or has failed to comply with any of the terms or conditions of employment specified thereunder."

The Company accepted the proposed contract in all respects except that it declined to agree to the inclusion of Section 12, and refused to sign unless that provision were

eliminated.[1] The Local would not sign the contract without the inclusion of Section 12. Because of this impasse, the union called strikes at all Cheatham jobs in Florida, and the three petitioning Locals obeyed the call. On the Company's charge of an unfair labor practice, the General Counsel of the Labor Board issued a complaint against the petitioners alleging, among other things, that in refusing to sign a contract embodying the wages, hours, and other terms and conditions of employment which had been agreed upon, unless the contract also provided for a performance bond, they had violated Section 8(b)(3) of the Labor Management Relations Act, 1947, 61 Stat. 136, 29 U.S.C. 158 (b) (3), which is as follows:

> "(b) It shall be an unfair labor practice for a labor organization or its agents—
> • • •
>
> "(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title; • • •."

The parties stipulated to the facts necessary to a determination, and waived their right to a hearing and to the issuance of a trial examiner's intermediate report and recommended order. Thereafter the Board issued a decision and order in which it held that, by refusing to sign a collective bargaining agreement unless it contained a provision requiring the employer to execute a performance bond, the petitioners had refused to bargain collectively with the

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[1] The employer and the union also failed to agree on the inclusion of another clause (Section 13) relating to employment of painters by the employer in areas outside of Jacksonville, but this issue is not in the case, the union not contesting the Board's order thereon. All other portions of the collective agreement were agreed to by both parties.

employer. The petitioners were ordered to cease and desist from "[i]nsisting * * * upon inclusion in the proposed contract of a clause requiring A. D. Cheatham Painting Company to post a performance bond * * *" and, upon request, to bargain collectively with the Company.

The petitioners and respondent, having respectively sought review and enforcement of the Board's order, stipulated that the only issue for our determination is the following:

> "Whether petitioners were guilty of a failure to bargain in good faith in violation of Section 8(b)(3) of the National Labor Relations Act by insisting, as a condition to agreement, that the collective bargaining contract contain a provision requiring the employer to post a performance bond."

"[W]ages, hours, and other terms and conditions of employment" are matters about which an employer and the representative of its employees must bargain in good faith: that is to say, under Section 8(d) of the Act, they are subjects of mandatory bargaining. But, those matters having been agreed upon, neither the employer nor the representative of its employees may refuse to enter into an agreement embodying them on the ground it does not include some provision about a matter which is not a mandatory subject of bargaining: such conduct is, in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining. *National Labor Relations Board* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 349, 42 LRRM 2034 (1958).

The question is, then, whether the union's demand that the company execute a performance bond is within the "other terms and conditions of employment," about which the Act requires the parties to bargain. In the statutory expression, "wages, hours, and other terms and conditions

of employment," the word "other" has significance: it shows that the terms and conditions of employment to which it refers are such as relate to the actual performance of labor in the same sense that wages and hours relate to that subject, or to the relations between the parties which result from the performance of work. So, we think the statutory language, "other terms and conditions of employment," refers to and includes only those provisions, in addition to wages and hours, which have to do with the actual performance of work or to subsequent relations.

The requirement of a performance bond has nothing to do with the performance of work, but is a condition which must be met before work is even undertaken. We are unwilling to say that a condition precedent to employment is a "condition to employment," such as wages and hours, within the meaning of the statute. It follows that, in our view, execution of a performance bond is not a condition of employment and, therefore, is not a subject of compulsory bargaining. Hence, under the Borg-Warner case, the union's conduct here was, in substance, a refusal to bargain about the subjects that are within the scop of mandatory bargaining.

It will be perceived from the language of Section 12, supra, that the union was demanding a bond which might be forfeited and the proceeds paid *to the union* should the contractor commit any "substantial breach" of the agreement or fail to comply "with any of the terms or conditions of employment specified thereunder." The union itself in proposing the language clearly recognized that terms or conditions of employment constituted subjects quite apart from liability to attach by virtue of the terms of the bond. There has been some suggestion that the clause is part of a proposed system of arbitration. The parties have exhibited no such arbitration plan. Congress, on the other

hand, *has* provided a remedy, available alike to an employer and a labor organization to be predicated upon a complaint of violation of a contract. The Supreme Court has held that 29 U.S.C. § 185 (1958), 61 Stat. 156, authorizes federal courts to fashion a body of federal-law for the enforcement of collective bargaining agreements. Textile Workers v. Lincoln Mills, 353 U.S. 448, 451, 40 LRRM 2113, 2120 (1957) [2]

The Court found that Congress in the 1947 amendment had expressed "a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations [as well as employers] and that industrial peace can be best obtained only in that way." Id. at 455. We are persuaded that Borg-Warner, as noted, spelled out the matters concerning which the parties must bargain in good faith.[3] A performance bond is not among them, for Congress has provided a remedy to be available in the event of a breach of the contract.

Our position is supported by *National Labor Relations Board* v. *Dalton Tel. Co.*, 187 F.2d 811, 27 LRRM 2503, (5th Cir. 1951), where a somewhat similar factual situation presented the same legal question we have here. There the company and the union reached an impasse in bargaining negotiations when after all substantive issues had been

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[2] After this case reached our court the union stated, and the Board agreed, that petitioners had insisted that the agreement include Section 12 because a year earlier than the expiration of the Florida contract, the employer *in Georgia* and *within the jurisdiction of a different Local* was said to have violated certain working rules and practices *in Georgia*. It was further recited in a stipulation before us, "The company states that no such violations occurred." (Emphasis added.)

[3] The cases cited in the third paragraph of the dissenting opinion were all decided before the Borg-Warner opinion was issued.

agreed upon, the company insisted, as a condition precedent to the execution of a contract, that the union register under a provision of the Georgia Code so as to be subject to suit on its contract. The union refused. The Fifth Circuit said the employer "(by insisting that the union become an entity amenable to suit in the state courts, left the sphere of 'terms and conditions of employment,' and conditioned his willingness to sign the agreement on a matter outside the area of collective bargaining."[4]

The employer's demand in the Walton case, that the union become subject to suit for enforcement, of, or because of a violation of, the contract, is comparable with the union's demand in the present case that the company give bond to pay a penalty should it violate the contract. The latter is no more one of the "other terms and conditions of employment" than was the former. Following the holding of the Fifth Circuit which the Supreme Court declined to review,[5] we hold that in insisting upon a performance bond the union left the sphere of "terms and conditions of employment" and conditioned its willingness to sign the agreement on the matter outside the area of compulsory bargaining.

Petition to set aside denied and enforcement ordered.

Dissenting Opinion

EDGERTON, Circuit Judge, dissenting:—As to "wages, hours, and other terms and conditions of employment" § 8

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[4] The Board points out in its Decision and Order that it has long held that an employer's insistence upon the filing of a performance bond by the union is a violation of Section 8(a)(5) beginning with Jasper Blackburn Corporation, 21 N.L.R.B. 1240, 6 LRRM 169, down to Cosco Products Co., 123 N.L.R.B. 91, 43 LRRM 1534. And see International Brotherhood of Teamsters, et al., 87 N.L.R.B. 972, 25 LRRM 1202.

[5] 342 U.S. 824, 28 LRRM 2625 (1951).

of the Act requires the parties to bargain collectively and obligates neither party to yield. As to other matters the Act permits bargaining but is held to forbid insistence. *National Labor Relations Board* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349, 42 LRRM 2034.

A bonding clause in a collective agreement is a means of enforcing the agreement. In my opinion it is a "condition of employment".[1] The "term 'bargain collectively' as used in the Act 'has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement of the United States'. *Telegraphers* v. *Railway Express Agency*, 321 U.S. 342, 346, 14 LRRM 506 (1944)." *National Labor Relations Board* v. *American National Insurance Co.*, 343 U.S. 395, 408, 30 LRRM 2147.[2] Congress preferred the broad expression "wages, hours, and other terms and conditions of employment" to a House version that would have limited compulsory bargaining to wages, hours and other specified subjects. § 2 (11) H.R. 3020, 80th Cong., 1st Sess., Legis.Hist. LMRA pp. 166, 313-314, 812, 867, 1541. Even that House version, which its sponsor said "limits bargaining to matters of interest to the employer and to the individual man at work"[3] included administrative and procedural provisions relating to the foregoing subjects."

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[1] The court suggests it cannot be a "condition of employment" because it is "a condition which must be met before work is even undertaken • • • a condition precedent to employment". That the strikers would not work without the clause, which they were under no obligation to do if the clause is a "condition of employment", does not show it is not a condition of employment. The record does not show when the bond was to be posted. I think it does not matter.

[2] Some agreements in this industry have contained bonding provisions.

[3] H. Rep. No. 245, 80th Cong., 1st Sess., Legis. Hist. LMRA p. 298.

Courts have required bargaining about a great variety of matters that do not relate to the actual performance of work, including rentals of company houses, *National Labor Relations Board* v. *Lehigh Portland Cement Co.*, 4 Cir., 205 F.2d 821, 32 LRRM 2463; checkoff of union dues, *National Labor Relations Board* v. *Reed & Prince Mfg. Co.*, 1 Cir., 205 F.2d 131, 136, 33 LRRM 2133; group health and accident insurance, *W. W. Cross & Co.* v. *National Labor Relations Board*, 1 Cir., 174 F.2d 875, 24 LRRM 2068; a profit-sharing retirement plan, *National Labor Relations Board* v. *Black Clawson Co.*, 6 Cir., 210 F.2d 523, 33 LRRM 2567, (dictum); an employee stock purchase plan, *Richfield Oil Corp.* v. *National Labor Relations Board*, 97 U.S.App. D.C. 383, 231 F.2d 717, 37 LRRM 2327, a retirement and pension plan, *Inland Steel Co.* v. *National Labor Relations Board*, 7 Cir., 170 F.2d 247, 22 LRRM 2506; and union security, *National Labor Relations Board* v. *W. T. Grant Co.*, 9 Cir., 199 F.2d 711, 31 LRRM 2063, *National Labor Relations Board* v. *Andrew Jergens Co.*, 9 Cir., 175 F.2d 130, 24 LRRM 2096.[4]

The bonding proposal before us was petitioners' response to what they claimed were company breaches of a previous agreement.[5] It was a "direct frontal attack" upon a vital

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[4] National Labor Relations Board v. Dalton Tel. Co., 187 F.2d 811, 27 LRRM 2503, on which the court relies, held that requiring a union to register with a Georgia court so as to subject itself to suit under Georgia law was "outside the area of compulsory bargaining", but the Fifth Circuit reached that conclusion for a reason that has no application in the present case, namely: "The Supreme Court has held that the bargaining rights created by the National Labor Relations Act may not be conditioned upon compliance with state registration laws, Hill v. Florida, 325 U.S. 538, 16 LRRM 734 • • •." 187 F.2d at 812.

[5] In a supplemental prehearing-conference stipulation petitioners say they insisted upon the bond because the company had "violated working rules and practices • • • with which the company had agreed to conform." The Company says there had been no violations.

problem. Cf. *Local 24, Teamsters Union* v. *Oliver*, 358 U.S. 283, 294, 43 LRRM 2374. Provisions which tend to insure performance of the agreement "materially affect" all its other provision. Cf. *National Labor Relations Board* v. *Lehigh Portland Cement Co., supra*, 205 F.2d at 823, 32 LRRM 2463. "A collective bargaining agreement is an effort to erect a system of industrial self-government." *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574, 580, 46 LRRM 2416.

Various proposals aimed, like the bonding clause, at enforcement of the collective agreement have long been regarded as within the mandatory bargaining requirement. An employer may insist on a no-strike clause. Lloyd A. Fry Roofing Co., 123 NLRB 647, 649, 43 LRRM 1507; Shell Oil Co., 77 NLRB 1306, 22 LRRM 1158; cf. *National Labor Relations Board* v. *Wooster Division of Borg-Warner Corp., supra*, 356 U.S. at 350, 42 LRRM 2034; *National Labor Relations Board* v. *American National Insurance Co., supra*, 343 U.S. at 408, 30 LRRM 2147, n. 22. It can hardly be questioned that, conversely, a union may insist on the absence of such a clause. It would be anomalous to interpret a statute intended to promote industrial peace as allowing insistence on a right to strike and yet forbidding insistence on a performance bond, which is a more peaceable means of enforcing compliance with a contract. No doubt a union may insist on a provision for arbitration. Cf. U. S. Gypsum Co., 94 NLRB 112, 28 LRRM 1015 (order amended on other grounds, 97 NLRB 889, 29 LRRM 1171). The bonding clause before us would apply only "in the event it is found by the Joint Trade Board hereunder" that the employer has committed a substantial breach of the agreement. It seems clear therefore that the clause, if adopted, would have been part of a system of arbitration.[6]

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[6] The contract terms to which the parties agreed, in the pending contract or in previous contracts, are not in the present record.

The Supreme Court has held that the phrase "terms and conditions of employment" is not so broad as to cover clauses which did not recognize a certified bargaining agent and required a secret pre-strike ballot. *National Labor Relations Board* v. *Wooster Division of Borg-Warner Corp., supra.* But the Court's reasons for holding that such clauses were not "terms and conditions of employment" do not touch the many cases construing the phrase broadly, and they do not apply to the bonding clause in suit.[7] This bonding clause would enforce compliance with the agreement by providing a private remedy in case of breach, but would not conflict with the statutory scheme reflected in § 301 of the Act,[8] which permits suit in a federal court for violation of an agreement. The Supreme Court has upheld enforcement, in suits under § 301, of an agreement to arbitrate, *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 40 LRRM 2113, 2120; *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414; *Steelworkers* v. *Warrior & Gulf Co., supra;* and of an arbitrator's award of damages, *Steelworkers* v. *Enterprise Corp.*, 363 U.S. 593, 46 LRRM 3006. The Court clearly finds no conflict between the remedy in § 301 of the Act and remedies which the parties create in the collective agreement.

Proposals that cannot be insisted upon are the less likely to be adopted.[9] To exclude bonding provisions from the

[7] The Court said the pre-strike ballot clause "deals only with the relations between employees and their unions", "substantially modifies the collective-bargaining system provided for in the statute by weakening the independence of the 'representative' chosen by the employees", and "enables the employer, in effect, to deal with its employees rather than with their statutory representative." The Court said the recognition clause was "an evasion" of the statutory duty "to bargain with the certified representative." 356 U.S. 342, 350, 42 LRRM 2034.

[8] 29 U.S.C. § 185, 61 Stat. 156.

[9] Cf. dissenting opinion of Mr. Justice Harlan in National Labor Relations Board v. Wooster Division of Borg-Warner Corp., supra, 356 U.S. at 352-3, 42 LRRM 2034.

scope of § 8(d) goes a long way toward excluding them from collective agreements. In 1947, when Congress adopted § 8(d), it expressed the fear that the Board had "gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counterproposals that he may or may not make." H.Rep.No. 245, 80th Cong., 1st Sess. 19 (1947); *American National Insurance Co.* v. *National Labor Relations Board,* 343 U.S. at 404, 30 LRRM 2147. After Borg-Warner, and only last year, the Supreme Court said: "* * * it remains clear that § 8(d) was an attempt by Congress to prevent the Board from controlling the settling of the terms of collective bargaining agreements * * * Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental powers to regulate the substantive solution of their differences. * * * Our labor policy is not presently erected on a foundation of government control of the results of negotiations." *National Labor Relations Board* v. *Insurance Agents,* 361 U.S. 477, 487, 488, 490, 45 LRRM 2704 (1960). Section 8(d) provides that the obligation to bargain "does not compel either party to agree to a proposal or require the making of a concession." It is "clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." *National Labor Relations Board* v. *American National Insurance Co., supra,* 343 U.S. at 404, 30 LRRM 2147.

These considerations require a broad interpretation of the "terms and conditions of employment" concerning which bargaining is required and insistence is permitted. I would set aside the Board's order.